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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 1204

MORRIS SAYLOR, Doing Business as Bell Coach Lines,
Appellant,

vs.

STRAIGHT CREEK BUS, INC., ET AL.,
Appellees

JURISDICTIONAL STATEMENT

The appellant, Morris Saylor, doing business as Bell Coach Lines, having presented this day his petition for appeal now files this his statement of the basis upon which it is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment or decree of the Court of Appeals of Kentucky in this action and should exercise such jurisdiction.

(a) The Statutory Provision Believed to Sustain the Jurisdiction

It is contended that the Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment or decree in question by virtue of the express provisions of Section 237 of the Judicial Code (28 U. S. C. A., Section 344), which provides in part in subsection (a):

> "A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could

be had, * * * where is drawn, in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

(b) The Statute of the State, the Validity of Which Was Attacked and Which Was Upheld by the Court of Appeals of Kentucky.

The State statute which was challenged by the appellant herein as being in conflict with a valid order of the Federal Office of Defense Transportation (General Order No. 21, Section 501.91) and which statute was declared to be valid by the Court of Appeals of Kentucky is Section 281.190(3) of the Kentucky Revised Statutes (Page 2105, Kentucky Revised Statutes, 1944). That section in so far as it is pertinent to this case provides:

"If any person holding a certificate over any public highway in this state between fixed termini or over a regular route fails to begin operation under the certificate on said line for a period of sixty days, * * * such certificate shall be and become null and void, and an order to that effect shall forthwith be entered on the records of the Division of Motor Transportation."

(c) The Date of the Judgment or Decree Sought to Be Reviewed and the Date Upon Which the Application for Appeal Is Presented.

The opinion of the Court of Appeals of Kentucky reversing the judgment of the Franklin Circuit Court was delivered on December 8, 1944; on January 26, 1945 the petition for the rehearing of this case was overruled and on February 6, 1945 the opinion of the Court of Appeals of Kentucky was extended upon its face, at which time the judgment or decree sought to be reviewed became final.

The petition for appeal herein was presented and filed on March 22, 1945.

(d) Statement showing That the Nature of the Case and of the Rulings of the Court Are Such as to Bring the Case Within the Jurisdictional Provision Relied Upon.

This case involves the validity of Common Carrier Bus Certificate No. 316 issued by the Division of Motor Transportation of the Commonwealth of Kentucky to the appellant, Morris Saylor, doing business as Bell Coach Lines, on June 28, 1943, which authorized the appellant to operate a bus service from Pineville to Kettle Island and Crockett, all within the Commonwealth of Kentucky. This certificate was issued to the appellant under the provisions of Chapter 281 of the Kentucky Revised Statutes over the protest of the appellee, Straight Creek Bus, Inc., which company operated a bus line over the identical routes.

On August 31, 1943, the appellant had not commenced the operation of the bus line authorized by Certificate No. 316 and the appellee filed a petition before the Director of the Division of Motor Transportation requesting that said certificate be declared null and void for failure of the appellant to commence operation within sixty days as required by KRS 281.190 (3) above quoted. (R. 13-15).

The appellant filed a response (R. 19-21) and amended response (R. 22-24) to said petition of appellant in which the validity of KRS 281.190 (3) was questioned as being in conflict with Federal regulations issued by the Office of Defense Transportation and Rubber Conservation, which agencies were created pursuant to authority of the First War Powers Act (50 U. S. C. A. App. Sec. 601). The Office of Defense Transportation under its General Order No. 21, which order became effective November 15, 1942, and which

was issued under the authority of Executive Orders No. 8989 and No. 9156, provided in Section 501.91;

> "On and after November 15, 1942, no person shall operate any commercial vehicle within the continental limits of the United States unless there is in force with respect to such commercial motor vehicle a certificate of war necessity issued by the Office of Defense Transportation governing such operation."

The appellant alleged that he had attempted to obtain Federal approval of his operation with due diligence but that due to inaction on the part of the Office of Defense Transportation he had been unable to obtain such approval within sixty days following the granting of the State Certificate No. 316 and that he was therefore excused from complying with the provisions of KRS 281.190 (3). The Director of the Division of Motor Transportation adjudged that the response and amended response of the appellant was insufficient; that KRS 281.190 (3) was in full force and effect and it was ordered that appellant's Certificate No. 316 be revoked. (R. 25-26).

From this decision the appellant appealed to the Franklin Circuit Court again challenging the validity of KRS 281.190 (3) as being in conflict with the regulations of the Office of Defense Transportation (R. 2-11). The Franklin Circuit Court after a hearing adjudged that where the holder of a State common carrier certificate was unable to obtain operating authority from the Federal Office of Defense Transportation under its regulations within sixty days following the issuance of the State certificate there existed a conflict between KRS 281.190 (3) and the Federal regulation and that the holder of the State certificate therefore was excused from complying with the State statute and it was accordingly ordered that Certificate No. 316 of the appellant be reinstated (R. 34-36).

An appeal was taken from this judgment to the Kentucky Court of Appeals, the highest State Court, where it was again contended by the appellant that there was a conflict between the Federal regulation and the State statute. The Court of Appeals by a six to one decision reversed the Franklin Circuit Court and adjudged that there was no conflict between the regulations of the Office of Defense Transportation and KRS 281.190(3). (See appended decisions).

The following statements were made by the Court of Appeals in the majority opinion:

> "At the time appellee was granted his Certificate there was in force general order No. 21 issued by the Director of the Office of Defense Transportation, a section of which provided:
>
> 'On and after November 15, 1942, no person shall operate any commercial vehicle within the continental limits of the United States unless there is in force with respect to such commercial motor vehicle a certificate of war necessity issued by the Office of Defense Transportation governing such operation.'
>
> "Appellee relies on the inescapable fact that since the Federal Constitution is the supreme law of the land, a Federal enactment authorized by that instrument prevails over a state statute and suspends the operation of the latter when its enforcement would necessitate or sanction the performance of an act prohibited by the former. But obviously that rule of necessity has no application here since there is no conflict between the Federal order and the State statute. True, the Federal order requires that during war time the operator of a commercial vehicle, regardless of whether he holds a state permit, must obtain a federal certificate; but it cannot plausibly be said that such a requirement suspends a state statute which commands nothing to the contrary, but merely withdraws a privilege to operate in the event the beneficiary fails or is unable to avail himself of the privilege within a specified time."

The appellant throughout this controversy has admitted that he failed to comply with the provisions of KRS 281.190 (3), which requires the holder of a State common carrier certificate to begin operation of the bus service authorized by that certificate within sixty days after such certificate was granted by the State. The only contention which the appellant has asserted in defense of his failure to comply with this provision of the Kentucky Statutes was and is that he was required to obtain approval of the Office of Defense Transportation before he could commence this operation; that he had attempted in good faith and with due diligence to obtain this Federal approval; that such approval could not be obtained within the sixty day period and that the State statute requiring the holder of a bus certificate to begin operation within sixty days was therefore in conflict with the regulation of the O. D. T. requiring the holder of a bus certificate to obtain approval of the operation before the service could be inaugurated.

(e) Statement of the Grounds Upon Which It Is Contended That the Question Involved Is Substantial

The only question involved on this appeal and the only question which has been raised and passed upon in the State tribunals concerns the validity of KRS 281.190(3). This question is substantial. This question tests the authority of the Federal Government to control and regulate intrastate motor transportation during times of war.

In time of peace the various states had exclusive authority to regulate and control purely intrastate motor transportation. However, at the outset of the present war it became necessary for the Federal Government to exert its sovereign power to take control to some extent of all motor transportation within the United States. Limited supplies of tires, gasoline and equipment had to be con-

served in order that essential internal transportation in this country should not be disrupted.

Acting under the authority conferred upon him by the War Powers Act the President of the United States created the Office of Defense Transportation whose duty it was and is to carry out that policy of conservation. This Office of Defense Transportation required the owners of all commercial motor vehicles to obtain certificates of war necessity before those vehicles could be operated. This regulation applied not only to interstate operations but to exclusvely intrastate activities as well. The Federal Government by reason of the exigencies of war had in so far as intrastate motor transportation was concerned entered a field which formerly was within the exclusive regulatory powers of the states. Consequently, a person attempting to operate a motor transportation business in intrastate commerce was required to comply not only with the laws and regulations of the state controlling such operation but also with the Federal laws and regulations.

With this background we wish to discuss the situation with which the appellant was presented. In the early part of 1943, the appellant realizing that there was a need for additional bus service from Pineville, Kentucky to Kettle Island, Kentucky and Crockett, Kentucky to carry coal miners from their homes to work and return and realizing that such an operation would be a lucrative and profitable one, filed an application before the Division of Motor Transportation of the Commonwealth of Kentucky to obtain a common carrier bus certificate with a view to inaugurate an operation over these routes. Following a hearing before the Director of the Division of Motor Transportation the Director found that the public convenience and necessity required the inauguration of such a bus service and he accordingly granted the appellant a common carrier bus certificate on June 29, 1943. Having obtained this au-

thority it then became necessary for him to obtain approval of the operation from the Federal Office of Defense Transportation under General Order No. 21 of that agency. This the appellant immediately attempted to do. Due to the unusual volume of business before the Office of Defense Transportation at that time approval could not be obtained immediately despite numerous attempts by the appellee to speed such action. Being unable to obtain such approval the appellant was faced with the alternatives of:

(1) Inaugurating the bus service from Pineville to Kettle Island and Crockett without obtaining approval from the Office of Defense Transportation. This course would have subjected him to Federal criminal prosecution for a violation of the regulations of the Office of Defense Transportation and would have prejudiced his rights to obtain gasoline, tires and equipment for his other authorized operations.

(2) He could further prosecute his attempt to obtain approval from the Office of Defense Transportation and delay the commencement or inauguration of the bus service until such approval could be obtained. Following this course appellant would run afoul of KRS 281.190(3) which required him to commence operations under the common carrier bus certificate within sixty days after he had been granted by the Division of Motor Transportation upon pain of forfeiting his State license.

It was impossible for the appellant to comply with both the Federal regulation and with the State law and acting upon the belief that the Federal regulation was supreme and superseded the State statute he did not commence operations within sixty days. Upon his failure to comply with the State statute the Director of the Division of Motor Transportation acting under the authority of KRS 281.190 (3) revoked the common carrier certificate of the appellee and this litigation has ensued as a result. Appellant has

attempted throughout this litigation to prevent the cancellation of his common carrier bus certificate on the ground that the Federal regulation and State statute were in conflict and that according to the fundamental rule that where a State statute and a Federal law are in conflict the Federal law is supreme and the State statute is superseded to the extent of the conflict.

The majority opinion of the Court of Appeals of Kentucky in adjudging that the appellant's certificate should be revoked declared that no conflict existed between the State statute and the Federal regulation and consequently the State statute was valid and the Director of the Division of Motor Transportation was required under the provisions of that statute to revoke this certificate. As was pointed out above, this decision was not concurred in by the entire court and Judge Sims in a dissenting opinion points out that there actually was a conflict between the State Statute and the Federal regulation as they applied to the appellant. The appellant has been deprived of a valuable property right by the majority decision—he is deprived of this property by reason of his attempt to comply with a valid Federal regulation.

A case which supports our belief that the question involved is substantial is *Southern Railway Company* v. *Reid, et al.*, 222 U. S. 424, 32 S. Ct. 140 (1912). That case involved the validity of a statute of North Carolina which required transportation companies to receive freight for transportation whenever tendered at a proper shipping point. The statute provided that if a transportation company refused to accept such shipment the party tendering the freight could recover $50.00 per day plus all actual damages from the company. Reid had tendered to the Southern Railway Company in Charlotte, North Carolina certain freight for shipment in interstate commerce and offered to pay the charges thereon. The railway company

declined to receive the goods for shipment for five consecutive days. On the sixth day the freight was accepted for shipment and the charges were prepaid by Reid. In this action Reid attempted to recover from the railway company the penalties prescribed by the statute. The railway company defended on the ground that the State statute was in conflict with the Commerce Clause of the United States Constitution and the Interstate Commerce Act of the United States. The Interstate Commerce Commission under authority of the interstate commerce act required all carriers of passengers or property to fix and file for approval with the Commission the rates, fares and charges to be made. If a transportation company accepted goods for shipment when rates had not been established as prescribed it would be subject to criminal prosecution.

The railway company had not fixed or published rates from Charlotte, North Carolina to the destination to which Reid wished to ship his freight. Since no rate was established at the time Reid tendered his freight for shipment the company refused to accept it until a rate had been established. It was contended by the railway company that it was excused from complying with the State statute since it was required by the Federal regulation to have an established rate before it could accept goods for shipment.

The Supreme Court of the State of North Carolina held that there was no conflict between the State statute and the Interstate Commerce Act and they upheld the penalty against the railway company. Two judges dissented.

On appeal to the Supreme Court of the United States the decision of the Supreme Court of North Carolina was reversed. It was held that the Federal Government had taken possession of the field of regulation of interstate shipments and it was said:

> "The statute of North Carolina conflicts with these requirements. What they forbid the carrier to do the

statute requires him to do, and punishes disobedience by successive daily penalties.

"We cannot assume that it was without consideration of its necessity that Congress enacted §2 of the Hepburn act. It was no doubt the adaptation of experience to the exigencies of a practical problem,—Congress coming to believe that the most effective way to prevent preferences in charges by carriers was to forbid them to 'engage or participate in the transportation of passengers or property' until they had fixed and proclaimed the rate to be charged therefor,—a rate that would be not only for one shipper or shipment, but for all shippers and shipments; not for one time only, but for all times. The power of Congress to so provide cannot be doubted. If the regulation be not exclusive, this situation is presented: *If the carrier obey the state law, he incurs the penalties of the Federal law; if he obey the Federal law, he incurs the penalties of the state law. Manifestly one authority must be paramount, and when it speaks the other must be silent. We can see no middle ground.* In so deciding we take no essential power from the states." (Underscoring ours.)

The similarity of the *Reid* case to the case at bar is so great that little comment need be made. In the *Reid* case, a state statute required a common carrier to do an act which it could not do until it had complied with a Federal regulation. Obviously, if the Southern Railway had published its rates for the route in question before Reid offered his freight for shipment (which it could have done) there would have been no conflict. But the fact that it was possible that the railway company might have avoided a conflict is immaterial.

The appellant might have obtained O. D. T. approval of his operation here involved within the sixty days required by the State statute, but he didn't, through no fault of his own. In each case, the carrier could not comply with the

state statute without running afoul of the Federal regulation, and vice versa.

In each case, the Federal regulation forbade the carrier to carry passengers in one case and freight in the other until Federal approval was obtained, while the state statute required the carrier to transport the passengers or freight without exception.

As was held in the *Reid* case, where the Federal statute or regulation fixes a prerequisite to the operation of the carrier, a state statute cannot require the carrier to operate before that Federal regulation is obeyed. This is precisely the situation raised by the case at bar.

(f) Statement Respecting Opinions

A copy of the majority opinion of the Court of Appeals of Kentucky is attached hereto as appendix "A"; and a copy of the dissenting opinion is attached hereto as appendix "B".

Respectfully submitted,

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APPENDIX "A"

COURT OF APPEALS OF KENTUCKY

STRAIGHT CREEK BUS, INC., *Appellant,*

vs.

MORRIS SAYLOR, et al. *Appellees*

Appeal from Franklin Circuit Court, William B. Ardery, Judge

Opinion of the Court by Justice Tilford—Reversing

On June 29, 1943, the appellee, Morris Saylor, doing business as Bell Coach Lines, was granted a Certificate of Convenience and Necessity to operate a bus line from Pineville to Crocket and Kettle Island, Kentucky, via Highways 21 and 221. He failed to begin operation under the Certificate within sixty days thereafter, and on August 31, 1943, the appellant, which had previously been granted a similar Certificate and hence had protested the granting of a Certificate to appellee, filed a written statement with the Director of the Division of Motor Transportation, calling attention to appellee's delinquency, and requesting that an order be entered declaring appellee's certificate null and void in accordance with the provisions of KRS 281.190, Subsection 3, which is as follows:

> "If any person holding a certificate over any public highway in this state between fixed termini or over a regular route fails to begin operation under the certificate on said line for a period of sixty days, or abandons operation thereunder, or fails to pay the renewal fees therefor for a period of thirty days after the due date thereof, or fails to keep the required insurance on file and in force, such certificate shall be and become null and void, and an order to that effect shall forthwith be entered on the records of the Division of Motor Transportation."

The Director notified appellee to appear and show cause why the Certificate should not be held null and void in accordance with the terms of the Statute; and during the course of the hearings held pursuant to that notice, appellee filed a response in which he set forth that immediately after the granting of the Certificate, he, in the name of his Company, "sought to obtain authority from the Office of Defense Transportation of the United States Government to commence operations and to inaugurate service but was advised by the Federal authorities charged with the responsibility of issuing gasoline and approving public transportation operations that it should not commence operations under this certificate until further notice from them, and in order to comply with the Federal regulations so as not to prejudice its right to obtain gasoline, tires, busses and replacements and in order to fully comply with the direction of Federal officials, it deferred placing said bus service into operations"; and further, that if appellant had not filed its statement requesting the entry of an order declaring the Certificate to be null and void, appellee "could and would have obtained permission from the Federal Government to inaugurate this service and would have placed the same in operation and would have fully complied with the rules and regulations of this department concerning insurance, payment of mileage tax, etc."

The Director adjudged the response insufficient and entered the requested order, whereupon appellee appealed to the Franklin Circuit Court, which, on January 28, 1944, entered a judgment setting aside the order of the Director and requiring him to reinstate the Certificate; and from that judgment the present appeal has been prosecuted by the holder of the previously granted Certificate.

At the time appellee was granted his Certificate there was in force general order No. 21 issued by the Director of the Office of Defense Transportation, a section of which provided:

> "On and after November 15, 1942, no person shall operate any commercial vehicle within the continental limits of the United States unless there is in force with respect to such commercial motor vehicle a cer-

tificate of war necessity issued by the Office of Defense Transportation governing such operation."

Appellee relies on the inescapable fact that since the Federal Constitution is the supreme law of the land, a Federal enactment authorized by that instrument prevails over a state statute and suspends the operation of the latter when its enforcement would necessitate or sanction the performance of an act prohibited by the former. But obviously that rule of necessity has no application here since there is no conflict between the Federal order and the State statute. True, the Federal order requires that during war time the operator of a commercial vehicle, regardless of whether he holds a state permit, must obtain a federal Certificate; but it cannot plausibly be said that such a requirement suspends a state statute which commands nothing to the contrary, but merely withdraws a privilege to operate in the event the beneficiary fails or is unable to avail himself of the privilege within a specified time. As we see it, the sole question is whether in the exercise of our proper function we should read into a Legislative Act a provision wholly unauthorized by its text and foreign to its intent. If the Legislature had indicated that delay beyond sixty days in beginning operation under the Certificate might be excused if occasioned by unavoidable casualty, or, for that matter, by any circumstance or state of fact whatever, we could reasonably hold that such delay should be excused when occasioned by the necessity of complying with interfering war time regulations, although the Legislature had not foreseen their promulgation. Courts are not limited to the literal wording of an Act indicating what exceptions to its operations are permissible when any, by its terms or necessary intendment, are permissible. But where it is apparent that no exceptions were intended, we cannot properly create them. Here, assuming the Statutes to have been observed, the public demand for service caused the Certificate to be issued. The same demand dictated that if the service was not properly inaugurated, the opportunity to supply it should be opened to others who might be able to do so. The primary intent to benefit the public

is apparent in all of the Statutes regulating the granting and revocation of such certificates; and hence, the intent of the Legislature that there should be no exception to the operation of the provision here under consideration is likewise apparent. Moreover, even though it were material to the decision of the case, we could not say that no other company could have secured a Federal certificate within a period of sixty days merely because appellee was unable to do so.

We find no merit in appellees' contention that his constitutional rights were violated by the order of the Director voiding the Certificate of Convenience and Necessity formerly granted him.

It follows that the trial Court should not have disturbed the order of the Director of the Division of Tranportation; but this conclusion will not preclude appellee from applying for another Certificate of Convenience and Necessity, which, if granted, will remove the barrier he alleges now exists to prompt and favorable consideration of his application for a Federal permit. Whole Court Sitting.

APPENDIX "B"

COURT OF APPEALS OF KENTUCKY

STRAIGHT CREEK BUS, INC., *Appellant*,

vs.

MORRIS SAYLOR, et al., *Appellees*

Appeal from Franklin Circuit Court

Dissenting Opinion by Judge Sims

I cannot agree with the majority of the Court that order No. 21 issued by the Director of the Office of Defense Transportation (hereinafter referred to as ODT) is not in conflict with KRS 281.190. The federal order prohibits anyone who has obtained a certificate of convenience and necessity under our statute from operating a bus until a permit is

received from ODT. This federal order does not provide a time limit within which it will grant or refuse such permit after an application is made to ODT for it, and this fact brings it in conflict with KRS 281.190, subsec. 3, which automatically voids the state certificate if the holder fails to begin operations thereunder within 60 days after it is issued. If the operator obeys the state law, he runs afoul the federal law; and if he obeys the federal law, he runs afoul the state law. Of necessity this makes a conflict between the state and federal laws. *11 Am. Jur., Sec. 175, pp. 872, 873, Southern R. R. Co. v. Reid, 222 U. S. 424, 56 L. Ed. 257, 32 S. Ct. 140; State, ex rel. Atwood, 170 Wis. 218, 175 N. W. 589, 7 ALR 1617.* Such conflict would excuse appellee from complying with KRS 281.190, subsec. 3, *Conquegrano v. Clark Motor, 30 Atl. 859; Sutterland Statutory Const.* Sec. 2027. This conflict may be avoided by reading into our statute an exception that the 60-day limitation is not applicable until the ODT has issued its permit, which is permissible, as will be subsequently shown.

No criticism is hereby directed at ODT's order No. 21, as there is no doubt that it is a salutary and necessary war measure. But the Director of the Division of Motor Transportation of Kentucky should certainly not be required to cancel the state certificate when the federal permit is not issued within 60 days after the state certificate is issued. The purpose of KRS 281.190, subsec. 3, is to prevent delay on the part of an operator in making use of his certificate so that the public may receive the service to which it is entitled, but the majority opinion thwarts the statute and brings about the very thing the Legislature sought to prevent. Should the ODT grant its permit 61 days after the state issued a certificate, then under the ruling of the majority, the Director must cancel the certificate he issued and the public must wait while the would-be-operator goes to the expense and trouble of filing a new application upon which there must be a notice of at least 10 days before there can be a hearing. KRS 281.060. As a matter of practice the Director requires a 30-day notice.

Sight is not lost of the reasoning in the majority opinion that KRS 281.190 subsec. 3, contains no exception by the Legislature and the courts are without authority to read

an exception into the statute. It seems to me this is answered by the rule that it is proper to imply an exception in a statute in order to obviate a construction which would be unjust, oppressive, unreasonable or absurd, and one that the Legislature never intended to include. Surely, if the Legislature of Kentucky had foreseen that a federal permit would have to be obtained before the state certificate could be put into effect, and that there was no time limit within which ODT had to act, the law makers would not have required the certificate to be automatically cancelled if not put into operation within 60 days after it was issued. *50 Am. Jur., Sec. 433, p. 454; Church of the Holy Trinity v. U. S., 143 U. S. 457, 36 L. Ed. 226, 12 S. Ct. 511.*

The opinion of the majority will cause great confusion in Kentucky in issuing certificates of convenience and necessity and will practically nullify all future certificates issued by the state and will necessitate an applicant to first obtain a federal permit before incurring the trouble and expense of obtaining a useless and meaningless state certificate, all of which would be obviated by giving our statute a practical and common sense interpretation, and one which would carry out the intention of the Legislature. To further complicate the situation, it is not at all certain that ODT will grant a permit before the applicant first obtains a state certificate; and, then if ODT does not act within 60 days, the state certificate becomes void under KRS 281.190, subsec. 3.